SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

HARDESTY & HANOVER INTERNATIONAL LLC & ORS v ABIGROUP CONTRACTORS PTY LTD

[2010] SASC 44

Judgment of The Full Court
(The Honourable Justice Sulan, The Honourable Justice Vanstone and The Honourable Justice Layton)

26 February 2010

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - ILLEGAL AND VOID CONTRACTS - EFFECT OF ILLEGALITY OR INVALIDITY

CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - THE CONTRACT - CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS - SETTLEMENT OF DISPUTES

Contract containing clauses dealing with the procedure to resolve disputes between the parties - whether expert determination purporting to be made pursuant to the dispute resolution procedure is enforceable - whether dispute resolution clause void for uncertainty.

Supreme Court Act 1935 (SA) s 50, referred to.
Nitschke Nominees v Hahndorf Golf Club (2004) 88 SASR 334; *Re Roberts* (1881) 19 Ch D 520, considered.

On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE JUSTICE ANDERSON) SCCIV-08-171 & SCCIV-08-1440

Appellant: HARDESTY & HANOVER INTERNATIONAL LLC Counsel: MR P MCNAMARA QC WITH MS K CLARK - Solicitor: FENWICK ELLIOTT GRACE

Respondent: ABIGROUP CONTRACTORS PTY LTD Counsel: MR S WALSH QC WITH MR B A SCHNOOKAL - Solicitor: COWELL CLARKE AS AGENTS FOR MADDOCKS LAWYERS

Hearing Date/s: 08/10/2009

File No/s: SCCIV-08-1440

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HARDESTY & HANOVER INTERNATIONAL LLC & ORS v ABIGROUP CONTRACTORS PTY LTD [2010] SASC 44

Full Court: Sulan, Vanstone and Layton JJ

1 **SULAN J:** This is an appeal from a judgment of Anderson J on a discrete issue in complex commercial litigation, which was commenced in this Court in February 2008.

2 The litigation has been the subject of a judgment on interlocutory matters by Gray J, which was appealed to the Full Court. Consequent upon the orders of the Full Court, a separate trial was ordered in respect of one issue which was heard and determined by Anderson J and is now the subject of this appeal. It is unfortunate that both time and cost have been expended on matters which could have been determined in the substantive proceedings which, at this stage, have not progressed.

Background

General

3 The dispute arises out of the construction of twin bridges across the Port River at Port Adelaide. The State government engaged Abigroup Contractors Pty Ltd ("Abigroup") to design and construct the bridges which were to span the Port River and provide access to both rail and road traffic across the Port River. Abigroup engaged Hardesty and Hanover LLP ("HHL") to provide certain design services in relation to the opening sections of the rail and road bridges for the purposes of enabling Abigroup to price and submit a response to an invitation to tender for the project. HHL is a limited liability partnership and is associated with Hardesty and Hanover International LLC ("HHI"), which is a limited liability company incorporated in the United States of America and holding itself out as having expertise as a bridge design engineer.

4 Abigroup alleges that, on 3 June 2004, it entered into a contract with HHL pursuant to which HHL agreed to provide expert advice in respect of the tender phase of the project. Abigroup alleges that the preliminary design work performed by HHL did not comply with the invitation to tender for the project and that it suffered loss and damage due to the negligence of HHL in the performance of the contract. Abigroup alleges loss and damage in the sum of $2,851,704.13, consequent upon the breach of contract and negligence.

5 On 8 July 2005, Abigroup won the tender to design and construct the bridges. It entered into Heads of Agreement with Transport SA, the South Australian government instrumentality assigned the task of building the bridges.

6 On 3 November 2006, HHI entered into an agreement with Abigroup, referred to as the Consultant Services Agreement ("CSA"), pursuant to which HHI agreed to provide services in relation to the opening spans of the road and

rail bridges, including a detailed design and construction support service for the project. Abigroup alleges that HHI failed to exercise due skill in the performance and completion of its obligations under the CSA.

7 In general terms, the CSA provides that Abigroup is required to pay a progressive fee to HHI with a mechanism for progress payments to be adjusted if the scope of services provided by HHI is varied. HHI is entitled to monetary compensation for variations. The agreement provides that the adjusted fee is to be agreed or, if the parties fail to agree an adjustment to the fee and Abigroup directs HHI to proceed with the work, then the fee will be adjusted according to the rates set out in the agreement, or based on reasonable rates as valued by Abigroup. If HHI disagrees with Abigroup's valuation, the CSA provides procedures for the resolution of disputes. The Dispute Resolution Procedures in the CSA has a primary focus on this appeal. In particular, whether the process provided for in the CSA was followed.

The dispute resolution provisions

8 The relevant clauses of the CSA are:

> 8. DISPUTE RESOLUTION
>
> 8.1 Settlement of Disputes
>
> If a dispute or difference arises between the parties in relation to any matter the subject of this Agreement ("Dispute"), any party seeking to resolve the Dispute must do so strictly in accordance with the provisions of this clause.
>
> - A party seeking to resolve a Dispute must notify the existence and nature of the Dispute to the other party ("Notice of Dispute").
>
> - Upon receipt of a Notice of Dispute the parties must negotiate in good faith to resolve the Dispute.
>
> If the parties fail to resolve the dispute or difference with seven (7) days after receipt by the other party of the Notice of Dispute, each party shall within a further seven (7) days nominate senior personnel to meet at a mutually convenient location.
>
> The senior personnel shall use their reasonable endeavours to resolve the dispute or difference and failing resolution of the dispute or difference shall explore and, if possible, agree on methods of resolving the dispute or difference by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute or difference. In the event that the dispute or difference cannot be resolved to the mutual satisfaction of the parties within twenty eight (28) days from commencement of the meeting of senior personnel then either party may refer the dispute for Expert Determination administered by the Australian Commercial Disputes Centre (ACDC). The Expert Determination shall be conducted in accordance with the ACDC Expert Determination Guidelines which set out the procedures to be adopted, the process of selection of the expert and the costs involved. Those guidelines are incorporated

as terms of this Agreement. The expert determination shall be final and binding provided;

(i) neither party gives notice to the other party within fourteen (14) days of the Expert Determination that they intend to refer the matter to arbitration or litigation and;

(ii) the amount awarded does not exceed $500,000.

Nothing in Clause 8 prejudices the right of either party to seek urgent injunctive or declaratory relief from a court in connection with a Dispute without first having complied with this Clause 8.

Despite the existence of a Dispute, each party must continue to perform its obligations under this Agreement. In particular, the Client must continue to comply with its payment obligations, except that the Client is entitled to withhold its reasonable assessment of the amount the subject of the Dispute.

...

SC12 ALTERNATIVE DISPUTE RESOLUTION

In substitution of the provisions of Clauses GC 12(c) and GC 12(d) of the Agreement, within 7 days of a party receiving the notice referred to in Clause GC 12(b) of the Agreement, the Abigroup Representative and the Consultant's Representative must meet and, in good faith, attempt to resolve the dispute or difference. If, within 14 days of this meeting, the dispute or difference is not resolved, the Division Managers (or their equivalents) of the parties must meet within 7 days of the expiry of that 14 day period and, in good faith, attempt to resolve the dispute or difference. If, within 21 days of the Division Manager's meeting, the dispute or difference is not resolved, the General Managers (or their equivalents) of the respective parties must meet within 7 days of the expiry of that 21 day period and, in good faith, attempt to resolve the dispute or difference.

SC12.1 Dispute resolution

(a) Unless otherwise agreed, if, within 14 days of the General Managers' meeting under Clause SC12, the dispute or difference is not resolved, it must:

(i) be dealt with in accordance with this Clause SC12.1; and

(ii) be determined by an independent expert in the relevant field agreed upon and appointed jointly by Abigroup and the Consultant.

(b) If, within 7 days of the end of the period referred to in Clause SC12.1(a) Abigroup and the Consultant cannot agree on the appointment of a person to act as the Independent expert, they must appoint the person nominated (on the application by either party) by the Chairperson or other senior officer for the time being of the Institution of Engineers, Australia or his or her nominee.

(c) The dispute or difference must be referred to the expert (agreed or nominated pursuant to Clause SC12.1(b)) by written notice in the form of Attachment 1 signed by both Abigroup and the Chief Executive Officer of the Consultant.

(d) The expert determination must be made in accordance with the rules for the expert determination process in Attachment 2.

(e) The expert must act in accordance with the code of conduct for an expert in Attachment 3.

(f) The expert:

(i) acts at all times as an expert and not as an arbitrator; and

(ii) may open up, review, decide again and substitute any Direction of Abigroup's Representative under this Agreement.

(g) Abigroup and the Consultant must share equally the costs of the expert determination process.

(h) Any determination made by an expert pursuant to this Clause SC12.1 is final and binding upon Abigroup and the Consultant except where the determination:

(i) requires a party to pay an amount in excess of $500,000; or

(ii) relates to a dispute or difference with respect to a Claim for greater than $2,000,000,

In which event the expert is deemed to be giving a non-binding appraisal and either party may commence litigation in respect of the dispute if it has not been resolved within 28 days of the expert giving his or her decision.

9 Clause 9.1(3) provides an order of precedence. It provides that special conditions take precedence over general conditions. It follows that Special Condition 12 (SC12) takes precedence over Clause 8.

The dispute about invoices

10 An issue arose in respect of certain invoices provided to Abigroup by HHI. It is unnecessary to set out in detail those invoices, but they relate to work done by HHI in 2006 and 2007. Abigroup alleges that it is entitled to a refund of an amount of $418,566.99 from payments which Abigroup has made to HHI.

11 On 27 January 2007, HHI issued what is referred to in the CSA as a "change order" claiming for extra work performed in 2006 in the amount of $446,091 (CSS1). On the same day, it issued a second change order for extra work alleged to have been performed and that would be performed in 2007, totalling 4230 hours (CSS2). Abigroup disputed both of HHI's claims and repeatedly questioned the amounts claimed by HHI.

12 On 28 April 2007, HHI issued a third change order for work that would be performed during the period 27 April 2007 and 31 August 2007 in the amount of $384,318 (CSS3).

13 On 3 May 2007, Abigroup advised HHI that CSS1, CSS2 and CSS3 were each rejected. The representatives of the parties had discussions about their respective claims.

14 On 14 June 2007, Mr Watson of Abigroup wrote to Mr Skelton of HHL and HHI referring to their discussions and confirming the mutual wish of the parties to have their disputes resolved by mediation. He wrote:

> It is our view that both Hardesty and Hanover's claim regarding outstanding fees for the construction phase and Abigroup's claims regarding Hardesty and Hanover's design performance should be discussed and resolved in this forum. Hence, we suggest that the parties allocate two days to this process.
>
> Abigroup would prefer to resolve these matters using alternate dispute resolution forums and as such requests confirmation that it is your intention to mediate in lieu of the dispute process specified in either Clause 8.1 or special condition 12 of the Contract.

15 On 27 June 2007, Mr Watson again wrote to inform Mr Skelton that he had had discussions with Fenwick Elliott Grace (HHI's legal representatives) and they had agreed that Mr Murdoch QC would mediate the dispute on 13 and 14 August 2007. Mr Watson indicated that Abigroup would prefer to resolve the matters via the mediation and he sought confirmation that the mediation would be in lieu of the dispute process stipulated in the contract.

16 On 3 July 2007, Mr Skelton wrote to Mr Watson:[1]

> As to the mediation arrangements, please have your legal people liaise with Fenwick Elliott Grace. Obviously this mediation renders the first phase of the contractual regime (General Managers' meeting) redundant, and I understand that we could replace the second phase (expert determination) with an adjudication procedure, such that if the mediator is unable to bring us to an overall agreement, we could make a decision binding at least as to cash flow. This would provide a solution that would see us through to the end of the project. We will ultimately end up invoking the third phase of contract dispute resolution if other methods are ineffective.

17 On 6 July 2007, Mr Watson responded:[2]

> You outlined a proposed course for the dispute resolution process as compared with the procedure set out in special condition 12 of the Consultant Services Agreement ("**the Agreement**"). I agree that the mediation replaces the first phase of the dispute resolution process provided for. However, I do not understand what you mean by replacing the "expert determination phase" with "an adjudication procedure" and "if the mediator is unable to bring us to an overall agreement, we could make a binding agreement on cashflow". Could you please explain the process contemplated in paragraph 2 of your letter.
>
> For our part, we have agreed to the mediation in good faith and in the expectation that we will both work towards resolving the issues identified above on a sensible and appropriate

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1 AB 612.
2 AB 615-6.

commercial basis. If that is not the outcome then we will need to determine by what other means they are resolved.

18 The mediation, which was held on 13 and 14 August 2007, failed.

19 On 23 October 2007, HHI issued a Notice of Dispute No 1 claiming an amount of $435,251.15 (excluding interest), and sought to refer the dispute to expert determination under the CSA. Abigroup contended that the dispute between the parties was for a greater amount than that contained in the Notice of Dispute No 1, and advised HHI that it did not regard any determination by an expert to be binding.

20 On 23 October 2007 Mr Skelton wrote to Mr Watson stating that HHI considered it appropriate for HHI to make a start now on working through the formal processes which deal with the resolution of disputes. He asserted as follows:[3]

> ***Total of Claim***
>
> The total amount claimed under this letter is $435,251.15. Accordingly, please treat this letter as a formal notice of dispute in respect of this sum. If you are not prepared to pay this amount within 7 days, we propose to implement the dispute resolution process in the CSA.
>
> ***CSA dispute resolution procedures***
>
> The CSA was not well drafted. There are two dispute resolution clauses, Clause 8 of the General Conditions and Clause SC12 of the Special Conditions. By virtue of Clause 9.13 (Order of Precedence) of the General Conditions, it is clear that the Special Conditions prevail.
>
> The opening limb of SC12 is premised upon a General Condition 12, and in particular, a Notice of Dispute under that clause, but there is no general Condition 12 of the General Conditions. It is clear that this is not merely a numbering error, because Clause 8 of the General Conditions is not divided into subclauses (a), (b), (c) and (d). Accordingly, the mechanism in the opening limb of Special Condition 12 for meetings by division managers/general managers (which look like defined terms, but which have not in fact been defined) do not take root. In any event, I think we are agreed that this part of the process has been overtaken by the mediation before Peter Murdoch QC. Alternatively, if you think any useful purpose would be served by any further attempts to resolve this first dispute by meetings, please let me know what you would propose.

21 On 5 November 2007, Mr Watson responded that Abigroup saw little utility in having any dispute resolved between them by expert determination, and that it was Abigroup's view that it was not the appropriate means of dispute resolution, given the range and complexity of the disputes between the parties. He indicated that Abigroup's position was that it considered that the only formal dispute mechanism available to the parties to achieve a binding resolution was by litigation.

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[3] AB 783.

22 On 12 November 2007, Abigroup alleged that, without its knowledge or involvement, HHI requested Engineers Australia to nominate an expert to hear and determine Notice of Dispute No 1. Thus, Mr Fullerton was nominated as the expert. Abigroup gave notice to Mr Fullerton that it contended that he did not have jurisdiction to hear the dispute. On 31 January 2008, Mr Fullerton determined that he had jurisdiction to hear and determine the dispute, the subject of Notice of Dispute No 1, and he commenced the expert determination process. Abigroup and HHI both provided submissions to Mr Fullerton without prejudice to Abigroup's claim that the expert lacked jurisdiction to hear the dispute.

23 Prior to any determination being made by Mr Fullerton, Abigroup had commenced proceedings in the Supreme Court of South Australia against HHI and Mr Fullerton seeking an interim injunction restraining Mr Fullerton from further considering the claim.

24 On 12 February 2008, the substantive hearing of the injunction was heard by Judge Lunn, who refused the injunction on the basis of his assessment of the balance of convenience. Judge Lunn expressed the view that Abigroup had made out a *prima facie* case on the question of whether the expert determination had been properly invoked.

25 On 28 February 2008, Mr Fullerton issued his determination of the dispute the subject of Notice of Dispute No. 1, that HHI was entitled to be paid $499,839.88.

26 On 6 March 2008, HHI issued a Notice of Dispute No 2 seeking $438,622.95. Again, Abigroup challenged the jurisdiction of Mr Fullerton to determine the dispute. One of the contentions of Abigroup is that the Dispute No 1 and Dispute No 2 were really parts of one dispute and should be treated as one dispute. If that were the case, the amount claimed and the amount awarded by the expert exceeded $500,000, which would make the expert's determination non-binding pursuant to Clause 8.1 of the CSA.

27 On 7 March 2008, HHI commenced a cross-action against Abigroup seeking a declaration that the expert determination made on 28 February 2008 was binding upon Abigroup, and seeking payment of $499,839.88, plus interest, plus $8217.50 in respect of fees of the expert, and a further $3583 by way of fees for the expert. HHI made application that the issue of whether Mr Fullerton's determination was binding be tried separately.[4] HHI also sought summary judgment in respect of its cross-action.

The decision of Gray J

28 The issue for Gray J was the application for a separate trial on the issue of enforceability of the expert determination and an urgent determination of that preliminary issue.

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4 *Supreme Court Rules 2006*, r 211.

29 During the course of the proceedings before Gray J, the parties agreed that Abigroup would pay an amount of $516,631.72, which was made up of the primary claim, plus interest, to HHI. HHI was to provide an irrevocable guarantee by a bank securing Abigroup's position in respect of the abovementioned payment, so that if ultimately HHI failed in its claim, Abigroup would be guaranteed repayment. That guarantee was to be irrevocable and for a period of four years.

30 The parties entered into a written agreement on 26 May 2008, which was annexed as a schedule to the order of Gray J, in which he stayed the application for summary judgment. Clause 4 of that agreement provided as follows:[5]

> The parties agree that this agreement does not to (sic) settle the question of whether Determination No. 1 is binding upon the plaintiff or if the First Defendant is or was ever entitled to any payment from the Plaintiff having regard to the issues in the proceeding, or vice versa, and that these questions still require resolution by the court. This agreement is accordingly made without prejudice to the plaintiff's contentions that no money is due from the Plaintiff to the First Defendant but rather monies are due from the First Defendant to the Plaintiff, and without prejudice to the First Defendant's contention that, absent this agreement, it would have been entitled to summary judgment.

31 On 30 May 2008, Gray J advised the parties that he did not intend to make an order for separate trials on the preliminary issue of the validity of the expert's determination. He published reasons on 8 September 2008. In his reasons, he referred to the compromise to which I have earlier referred. He said:[6]

> In the course of the interlocutory proceedings, substantial progress was made toward a compromise involving a payment by Abigroup to HHI in respect of the amount determined by the expert, but subject to a secured obligation to repay in the event that HHI is ultimately unsuccessful in its claims. Earlier attempts by the parties to negotiate a settlement of this aspect of the matter had been unsuccessful, but a settlement at least in principle has now been reached. Abigroup is prepared to make a payment and it has required what appears to be reasonable security. As HHI has no assets in the jurisdiction, a guarantee from a bank within the jurisdiction has been sought. Negotiations continued for several weeks, culminating in an agreement in principle. The agreement, however, is yet to be executed. HHI has suggested in an unspecified way that the sub-prime collapse in the United States has caused a problem in providing a bank guarantee. However, what is clear is that Abigroup is prepared to make payment, subject to the secured obligation to repay in the event that the Court determines such an entitlement. This arrangement has taken the urgency out of HHI's application. The problem with giving effect to the arrangement is a problem arising from HHI's assets being out of the jurisdiction.
>
> Against this background, the Court has explored the way to progress this difficult and complex litigation in a commercially expedient manner. Both parties are content to adopt a procedure designed to achieve this end. Abigroup, for its part, is content to agree to a fast-track procedure for the entire litigation. In its view, the proceedings could, with appropriate resourcing and priority, be ready for trial in October 2008.

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5 AB 1156.
6 AB 1177 [11] – [12].

32 HHI opposed the fast-track procedure for the entire litigation, and indicated to Gray J that it intended to issue third party notices which would, necessarily, delay the whole proceedings. Gray J observed that, on the one hand, HHI were not treating the overall proceedings as being urgent, in particular Abigroup's claim for damages for breach of duty but that, on the other hand, HHI was finding urgency in respect of interim payments.

33 Gray J rejected HHI's submissions and indicated that the Court was prepared to offer an expedited hearing. HHI appealed Gray J's decision, refusing an application for a separate trial of the issue of enforceability of the expert determination. The matter was heard by the Full Court and, on 23 December 2008. The Full Court allowed the appeal and ordered a separate trial limited to the issue of whether the expert determination is final and binding on the parties.

The decision of Anderson J

34 The separate trial was heard by Anderson J, who concluded that Mr Fullerton had erred in deciding he had jurisdiction as an expert to determine the dispute. Consequently, the determination was held to be unenforceable. I will return to Anderson J's reasons later in these reasons.

35 As a consequence of Anderson J's decision, an additional issue arose as to whether the amount paid by Abigroup, pursuant to the agreement of 26 May 2008 referred to earlier in these reasons, should be repaid to Abigroup by HHI. Anderson J concluded that the purpose of Gray J's order and the settlement agreement was to resolve HHI's application for summary judgment on the counterclaim. As the counterclaim had been determined in Abigroup's favour, he concluded that the sum that had been paid to Abigroup of $516.631.72, plus interest, together with a sum paid to the expert of $3583, should be reimbursed to Abigroup. The appellant appeals that order.

36 I now turn to the issue of the enforceability of the expert determination. In considering SC12, it is necessary to have regard to the opening words which state:

> In substitution of the provisions of Clauses GC 123(c) and GC 12(d) of the Agreement, within 7 days of a party receiving the notice referred to in Clause GC 12(b) of the Agreement, the Abigroup Representative and the Consultant's Representative must meet and, in good faith, attempt to resolve the dispute or difference.

37 The agreement, and in particular the dispute resolution provisions, provide a specific procedure which the parties are required to follow in order to trigger the appointment of an independent expert.

38 Anderson J observed that, insofar as SC12 provides a procedure by which to institute the dispute resolution provisions, the reference to Clauses GC 12(b), 12(c) and 12(d) is meaningless, because there are no such clauses as specified. There is, therefore, no procedure provided for initiating the dispute.

39 Anderson J determined that SC12 cannot, therefore, operate and that it was void for uncertainty. It follows from his reasoning that, as there was no valid commencement procedure, there was no way in which SC12 could operate.

The appeal

40 The appellant contends that Anderson J was wrong, and that the first limb of SC12 was intended to refer to the unnumbered sub-paragraphs of GC8. The appellant submits that the words of SC12 were not intended to displace the notice provisions of GC8, which is the only contractual mechanism for initiating a dispute resolution process or procedure. The contention is that the GC8 procedures should therefore apply and be integrated into the SC12 procedures. It was therefore contended that SC12 must be read together with GC8 and either party could, therefore, initiate an SC12 dispute using the provisions of GC8.

41 In *Nitschke Nominees v Hahndorf Golf Club*,[7] Besanko J referred to the principle that the Court will strive to uphold the reasonable expectations of the parties who believe that they had a contract. He said:[8]

> It is well established that courts strive to uphold the reasonable expectations of parties who believed they had a contract: *Hillas & Co Ltd v Arcos Ltd (No 2)* (1932) 147 LT 503. It is also well established that there is a distinction between uncertainty of meaning which is resolved by a process of construction and absence of meaning. In *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, Barwick CJ said (at 436-437):
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> > But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, or ascertaining the intention of the parties, and of applying it. Lord Tomlin's words in this connection in *Hillas & Co Ltd v Arcos Ltd* ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *G Scammell & Nephew Ltd v Ouston* [1941] AC 251 is not "so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved.

42 In my view, the parties to the CSA intended to provide a procedure for the resolution of disputes by an expert. They provided a specific procedure under SC12 and GC8 by which to institute alternate dispute resolution. The references in SC12 to a notice referred to in GC 12(b), (c) and (d) where no such clauses exist, cannot, in my view, be read as referring to a notice referred to in GC8. The

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7 (2004) 88 SASR 334.
8 Ibid, 355-6, [55].

giving of a notice defines the parameters of the dispute. In my view, it is fundamental to the operation of SC12 that the dispute be defined.

43 The appellant's contention requires the Court to imply that the procedure to institute the dispute resolution process in SC12 is that provided in GC8, and that the draftsperson made an error in failing to specify this. I reject that contention. The CSA is an extensive and comprehensive document. The dispute resolution provisions are very specific as to the processes to be invoked and the timely steps the parties are required to take towards resolving any dispute.

44 The general conditions of the CSA provide that, if a dispute arises, then the parties are bound by a strict procedure (GC8). The party seeking a resolution is required to issue a Notice of Dispute. Once served, the parties must negotiate in good faith and, if they fail to resolve their differences within seven days, each party shall nominate senior personnel to meet. The senior personnel are to use their best endeavours to resolve the dispute. If no resolution is reached within 28 days from the commencement of meetings between the senior personnel, then either party may refer the dispute for expert determination administered by the Australian Commercial Dispute Centre.

45 In addition, there are special conditions of the contract which take precedence over the general conditions. SC12 requires that the parties meet and negotiate before the nomination and appointment of an expert arbiter by the Institute of Engineers.

46 Clause SC12 fails to provide a meaningful procedure for the commencement of the dispute resolution process. If the parties had intended that the GC8 procedure was to be invoked to resolve a dispute under SC12, it would have been simple for the draftsperson to refer specifically to GC8. In my opinion, the Judge was correct in holding SC12 was void for uncertainty.

47 The appellant further contends that there was no agreement that the mediation take place in lieu of the contractual dispute resolution mechanism, and that the respondent and appellant agreed that the mediation be a substitute for the first contractual phase of alternate dispute resolution, that being the managers' meeting.

48 Although in his letter of 6 July 2007 Mr Watson indicated that Abigroup agreed that the mediation "replaces the first phase" of the dispute resolution process, that statement must be read in its context. He indicated that he did not understand the process contemplated by Mr Skelton in his letter of 3 July 2007. Mr Watson stated that, if the mediation did not resolve the issues, then the parties would need to determine, by what other means the issues were to be resolved.

49 I reject the appellant's argument that it was the intention of the parties that the procedures in GC8 be applied to initiate the dispute resolution procedure

under SC12. The evidence indicates that Mr Watson and Mr Skelton had not agreed that the mediation would be a substitute for the notice provisions in GC8.

50 Even if I am wrong in my conclusions as to the intention of the parties, and if the appellant's contention that the preliminary requirements of GC8 were in fact waived by the mediation, still I observe that GC8 required that a party refer the dispute for expert determination administered by the Australian Commercial Dispute Centre.

51 HHI unilaterally referred the dispute to Engineers Australia which appointed the expert, Mr Fullerton. It did not comply with GC8. The parties were not in agreement as to the process.

52 As the appointment of Mr Fullerton did not accord with the requirements of Clause GC8, it follows that his expert determination is unenforceable.

53 I have read the draft reasons of Vanstone J. I also agree with her reasons for concluding that the expert report of Mr Fullerton is unenforceable. I agree that it is unnecessary to consider Anderson J's further reasons in which he concludes that the disputes were formulated by the appellant in a manner not contemplated by the CSA.

Consequential orders

54 I agree with the reasons of Vanstone J. I agree with the orders she proposes.

55 As to the decision of Anderson J concluding that the determinations of the expert are unenforceable, I would dismiss the appeal.

56 As to the appeal against the decision of Anderson J requiring the appellant to repay to Abigroup $516,631.72, plus interest at 8 per cent, and ordering that HHI reimburse Abigroup in the amount of $3583, plus interest at 8 per cent, and, further, ordering that the guarantee provided in favour of Abigroup be released, I would allow the appeal and set aside the orders.

57 **VANSTONE J.** Hardesty & Hanover International LLC (Hardesty) appeals against the decision of a judge that two determinations of an expert, purportedly made in accordance with the dispute resolution provisions of a contract between Hardesty and the respondent Abigroup Contractors Pty Ltd (Abigroup), were not binding. Each determination is the subject of a separate action, but the actions have been dealt with together. The decision under appeal is interlocutory in nature, because the subject matter of the disputes purportedly dealt with by the expert will now form part of the issues before the judge who ultimately hears the trial.

58 A supplementary notice of appeal raises arguments concerning consequential orders separately made by the judge, directing the return to Abigroup of an amount equal to the first expert award, previously paid by it to Hardesty.

Status of expert determinations

59 The dispute between the parties arises from the design and construction of two opening bridges spanning the Port River at Port Adelaide. Abigroup was engaged by the State government to build the bridges. It engaged Hardesty to provide consultancy and design services. More detail about the arrangements is given in the judgment under appeal, the reference being [2009] SASC 95. It is unnecessary for present purposes to descend to further detail.

60 The contract governing Hardesty's engagement made provision for dispute resolution in both its "general" and "special" conditions. By clause 9.13, the special conditions were to take "precedence" over the general conditions.

61 There were differences between the two dispute resolution regimes created by the contract: general condition 8 (GC8) and special condition 12 (SC12). Although each provided for a triggering notice, a series of negotiations by specified personnel and a timetable regulating those negotiations – as well as machinery by which to refer the dispute to expert determination – the stipulations differed as between the two clauses. Importantly, the conditions under which any determination would become binding were materially different; although in each case awards over $500,000 were expressed not to be binding.

62 By an error of drafting the opening lines of SC12 included references to provisions of the contract which were non-existent. Whether those lines could be severed, leaving the balance of SC12 to operate, or whether the error was such as to render the whole clause inoperable, was a matter of dispute.

63 The judge gave comprehensive reasons for his decision that the expert's determinations were not binding due to a lack of jurisdiction. The judge supported his decisions on a number of bases. In essence he decided:

- That SC12 was void for uncertainty and that therefore the issues were to be determined by reference to GC8 alone [112], [117].

- That on its own terms the contract required strict compliance with the procedures which were prerequisites for reference to an expert [108].
- That there was not strict compliance with the procedures in GC8 (or indeed SC12). For instance the notice provisions were not complied with, the negotiation phase was not completed and the signature of both parties required by SC12.1(c) was not furnished [113], [118].
- That although the parties had agreed at an early stage that one of the disputes between them should go to mediation without need of strict compliance with the dispute resolution prerequisites, dispensation for that purpose neither expressly nor impliedly operated in respect of any other dispute [109] – [111].
- The way in which Hardesty ultimately referred disputes to the expert was to re-formulate claims with a view to ensuring that any amount awarded would not exceed the $500,000 ceiling. This was a contrivance and the references failed to reflect the real disputes between the parties [98], [99] and [103].

64 The judge's decision is attacked in several respects. First it is said that the unintelligible parts of SC12 could have been severed, leaving the balance of the clause, in combination with parts of GC8, to give effect to the parties' original intention. It was said that the court should not "repose on the easy pillow" of a conclusion that the entirety of SC12 was void. (*Re Roberts* (1881) 19 Ch D 520, 529.)

65 Second, it is put that the judge wrongly held that once the mediation failed, the only disputes which could be referred to an expert were the very disputes referred to the mediation. Reference was made to [110] and [112]-[113] of the judge's reasons. In my view this contention mistakes the judge's meaning. The importance of identifying the dispute which went to mediation was that in respect of *that* dispute, the parties had agreed to sidestep the negotiation phases described in GC8 and SC12. However, before taking other disputes, differently formulated, before an expert, those stipulations regarding notice and negotiation would need to be met. This is made clear by the judge at [111] of his reasons. He said:

> [111] If HHI wished to have any dispute, other than the one which was referred to mediation, determined by an expert it was then required to follow the procedure set out in the contract and properly identify and notify to the other side the exact nature and extent of the dispute and follow the staged negotiation process in respect of that precise dispute.

In any event, Hardesty also argues – contrary to his Honour's finding – that there was compliance with those stipulations.

66 Third, the appellant attacks the judge's finding that the way in which the disputes were later reformulated and put to the expert was a contrivance designed to ensure that any award would not exceed $500,000. It argues that the contract allowed for, indeed dictated, monthly billings, that it allowed for serial disputes to be taken to an expert and that Hardesty was not obliged to formulate its claims in conformity with the dispute which had gone to mediation.

67 Further arguments were made. These went to the correct characterisation of the notices of dispute on which the expert determination proceeded, a challenge to the judge's intimation that, if necessary, he would have implied a term into the contract with respect to the contrivance issue, and as to procedural fairness of a particular finding. In the way I have determined the matter, it is not necessary to explore these arguments further.

68 I can deal with each of the three issues I have identified relatively briefly.

Operation of SC12

69 I am not persuaded that the judge's finding as to SC12 was in error. I set out relevant parts of the two clauses.

> 8. DISPUTE RESOLUTION
>
> 8.1 Settlement of Disputes
>
> If a dispute or difference arises between the parties in relation to any matter the subject of this Agreement ("Dispute"), any party seeking to resolve the Dispute must do so strictly in accordance with the provisions of this clause.
>
> - A party seeking to resolve a Dispute must notify the existence and nature of the Dispute to the other party ("Notice of Dispute").
> - Upon receipt of a Notice of Dispute the parties must negotiate in good faith to resolve the Dispute.
>
> If the parties fail to resolve the dispute or difference within seven (7) days after receipt by the other party of the Notice of Dispute, each party shall within a further seven (7) days nominate senior personnel to meet at a mutually convenient location.
>
> The senior personnel shall use their reasonable endeavours to resolve the dispute or difference and failing resolution of the dispute or difference shall explore and, if possible, agree on methods of resolving the dispute or difference by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute or difference. In the event that the dispute or difference cannot be resolved to the mutual satisfaction of the parties within twenty eight (28) days from commencement of the meeting of senior personnel then either party may refer the dispute for Expert Determination administered by the Australian Commercial Disputes Centre (ACDC). The Expert Determination shall be conducted in accordance with the ACDC Expert Determination Guidelines which set out the procedures to be adopted, the process of selection of the expert and the costs involved. Those guidelines are incorporated

as terms of this Agreement. The expert determination shall be final and binding provided;

(i) neither party gives notice to the other party within fourteen (14) days of the Expert Determination that they intend to refer the matter to arbitration or litigation and;

(ii) the amount awarded does not exceed $500,000.

Nothing in Clause 8 prejudices the right of either party to seek urgent injunctive or declaratory relief from a court in connection with a Dispute without first having complied with this Clause 8.

Despite the existence of a Dispute, each party must continue to perform its obligations under this Agreement. In particular, [Abigroup] must continue to comply with its payment obligations, except that [Abigroup] is entitled to withhold its reasonable assessment of the amount the subject of the Dispute.

and

SC12 ALTERNATIVE DISPUTE RESOLUTION

In substitution of the provisions of Clauses GC 12(c) and GC 12(d) of the Agreement, within 7 days of a party receiving the notice referred to in Clause GC 12(b) of the Agreement, the Abigroup Representative and [Hardesty's] Representative must meet and, in good faith, attempt to resolve the dispute or difference. If, within 14 days of this meeting, the dispute or difference is not resolved, the Division Managers (or their equivalents) of the parties must meet within 7 days of the expiry of that 14 day period and, in good faith, attempt to resolve the dispute or difference. If, within 21 days of the Division Manager's meeting, the dispute or difference is not resolved, the General Managers (or their equivalents) of the respective parties must meet within 7 days of the expiry of that 21 day period and, in good faith, attempt to resolve the dispute or difference. *(italics added)*

SC12.1 Dispute resolution

(a) Unless otherwise agreed, if, within 14 days of the General Managers' meeting under Clause SC12, the dispute or difference is not resolved, it must:

(i) be dealt with in accordance with this Clause SC 12.1; and

(ii) be determined by an independent expert in the relevant field agreed upon and appointed jointly by Abigroup and [Hardesty].

(b) If, within 7 days of the end of the period referred to in Clause SC 12.1(a) Abigroup and [Hardesty] cannot agree on the appointment of a person to act as the Independent expert, they must appoint the person nominated (on the application by either party) by the Chairperson or other senior officer for the time being of the Institution of Engineers, Australia or his or her nominee.

(c) The dispute or difference must be referred to the expert (agreed or nominated pursuant to Clause SC 12.1(b)) by written notice in the form of Attachment 1 signed by both Abigroup and the Chief Executive Officer of [Hardesty].

…

(g) Abigroup and [Hardesty] must share equally the costs of the expert determination process.

(h) Any determination made by an expert pursuant to this Clause SC 12.1 is final and binding upon Abigroup and [Hardesty] except where the determination:

(i) requires a party to pay an amount in excess of $500,000; or

(ii) relates to a dispute or difference with respect to a Claim for greater than $2,000,000.

in which event the expert is deemed to be giving a non-binding appraisal and either party may commence litigation in respect of the dispute if it has not been resolved within 28 days of the expert giving his or her decision.

70 As mentioned, the references in the italized lines of clauses GC12(b), (c) and (d) were in error. No such clauses exist. They do not appear in GC8. The difficulty with simply excising those opening lines of SC12 is that the non-existent "notice referred to in Clause GC12(b) of the Agreement" is the trigger for the process described in the balance of the clause. It can be seen from both GC8 and SC12 that some care has been taken to map a sequence of events or process leading to the expert determination. The notice of dispute is the critical originating step. It is not possible, in my view, simply to assume that the notice contemplated by SC12 is necessarily the same as that required by GC8. Indeed, the very fact that the respective processes are different and have different consequences in terms of the enforceability of any determination tends to a conclusion that SC12 might require more in terms of definition of the dispute than does GC8. Moreover, it is not as if excising SC12 undermines the workings of the contract. On the contrary, it does away with the uneasy superimposition of the pre-eminent SC12 upon GC8.

Procedure for dispute referral

71 I turn to deal with the appellant's contention that the judge erred in finding that the appellant had failed to comply with the procedure set out in the contract (for my purposes GC8) as a prerequisite to an expert determination.

72 The appellant relies on its letter dated 23 October 2007 written by Mr Paul Skelton to Mr Watson of Abigroup. This is said to be the first "Notice of Dispute" as contemplated by GC8. It was written a bit over two months after the failed mediation.

73 The writer said that it was "appropriate" to "make a start now on the process of working through the formal processes which deal with the resolution of disputes". He then discussed elements of Hardesty's claim. Later in the letter reference was made to the dispute resolution clauses. The writer noted the drafting error to which I have referred. He said:

Accordingly, the mechanism in the opening limb of Special Condition 12 for meetings by division managers/general managers (which look like defined terms, but which have not

> in fact been defined) do not take root. In any event, I think we are agreed that this part of the process has been overtaken by the mediation before Peter Murdoch QC. Alternatively, if you think any useful purpose would be served by any further attempts to resolve this first dispute by meetings, please let me know what you would propose.

The writer then went on to seek agreement as to the appointment of an expert.

74 Mr Watson replied on Abigroup's behalf by letter dated 5 November 2007. He indicated that the sum claimed would not be paid. He went on:

> You have requested Abigroup's agreement to deem the mediation process already undertaken as satisfying the "negotiation" component of the contract dispute resolution process. You have also asked us to agree to appoint either Ian McDowall or Peter Murdoch QC as experts for the purpose of expert determination.
>
> We see little utility in having any dispute resolved between us by expert determination because the expert determination process under the contract is not final and binding. Even if it was, it is not the appropriate form of dispute resolution for the range and complexity of the disputes between us.

Mr Watson then asserted that under GC8 such a process would not lead to a binding determination because either party could refer the matter to litigation, and he asserted for additional reasons that a finding under SC12 would not be binding. He further asserted that Abigroup's own claim against Hardesty involved a claim in excess of $2 million.

75 Mr Watson referred to Hardesty's reformulation of the claim in a sum less than $500,000 as being an approach "not contemplated" by the contract and that it was "an improper use of the expert determination mechanism". He concluded:

> We consider that the only formal dispute mechanism available to the parties to achieve a binding resolution is litigation.

76 Mr McNamara QC, for the appellant, put that the requirements under GC8 and SC12 to negotiate as a prelude to expert determination were in essence met, because Hardesty had invited Abigroup's proposal as to any further attempts to resolve the first dispute. Presumably, the appellant would say that the same invitation could be regarded as having been issued in relation to the second dispute. (We were not referred to any similar communication preceding Hardesty's reference of the second dispute to the same "expert".)

77 The judge rejected such a contention and I think rightly so. As I have said, GC8 requires strict compliance with the process set out. It contemplates a degree of co-operation between the parties. Like the judge, I consider that there was no compliance with the requirements of GC8 (nor even SC12).

78 I arrive at this conclusion from a fair reading of both GC8 and SC12. Two points are decisive.

79 First, it is clear that the parties contemplated that disputes arising during the course of performance of the contract could be referred to an expert, provided that they were properly identified and that all proper attempts were first made, in good faith, to reach a solution. In my view, the way in which the machinery was sought to be utilised by the appellant is far from what was contemplated. Mr McNamara QC put that it was "a bit rich" to say that Hardesty had not complied with the negotiation regime, when it had sought suggestions from Abigroup as to any procedure which it thought might achieve resolution. It seems to me that it is not really to the point whether such an invitation was issued or what the response was. In circumstances where the contract requires *strict compliance* with the steps it sets out as a prelude to reference to an expert, non-compliance, for whatever reason, is fatal to the validity of the determination reached. It is beside the point that Abigroup failed to comply with the procedure by maintaining a position that any determination would not be binding. Objectively, there was no compliance with the required process. Without compliance, the jurisdiction of the expert was not enlivened.

80 But even were Mr McNamara's submission to be accepted, there is another reason why the expert lacked jurisdiction in this matter. GC8 required that the dispute must be referred to the Australian Commercial Disputes Centre. This was not done. Instead, the expert engaged by Hardesty was a person nominated by the Associate Director, Engineers Australia, as contemplated by SC12. The referral of the dispute to an expert appointed by Engineers Australia has inevitably resulted in a different person, with different expertise, being appointed. In addition, the actual procedure to be adopted for the expert determination is different. The conduct of a determination under GC8 was to comply with "the ACDC Expert Determination Guidelines". SC12 on the other hand referred to an attachment to the contract entitled "Code of Conduct for an Expert", which set out the requisite procedure. There is no evidence that Hardesty ever considered referring the dispute to the Australian Commercial Disputes Centre. It purported to act under SC12. It cannot be said that there was ever compliance with GC8 given that the dispute was referred to the "wrong" expert.

81 For all these reasons, I agree with the judge that there was no compliance with the requirements of GC8 (and, in relation to the first issue raised above, nor even SC12), and therefore the expert acted without jurisdiction and the determination was not binding.

82 The second expert determination cannot stand for the same reasons as the first.

83 The conclusion I have reached on this topic disposes of that part of the appeal which concerns the determinations. It is unnecessary to consider the judge's further finding that the way in which the disputes were reformulated and provided to the expert amounted to a "contrivance" not contemplated by the

agreement. I mention again that the decision under appeal in no way determines the ultimate rights of the parties to recover pursuant to the contract.

Consequential orders

84 The appellant challenges certain findings and consequential orders made by the judge in a separate decision given on 19 May 2009. Two challenges are made.

85 First, it is said that the judge erred in finding that certain paragraphs of the respondent's statement of claim were "finally determined" by the earlier judgment. Following the handing down of the first decision on 8 April 2009, the judge considered the submission of Hardesty that there should be no costs order arising from the hearing, because the issues underlying the purported expert determination had not been finally determined. In rejecting that submission the judge stated:

> [15] On the pleadings of [Hardesty] in its cross-action it has failed and judgment has been entered. I can see no reason why judgment should not be given on those paragraphs of the statement of claim as argued by Abigroup. The matter has been finally determined and it is not open for re-argument in the main trial of this action.

Although it appears that the judge saw no impediment to giving judgment on the relevant paragraphs of the statement of claim, no corresponding order was ultimately made. Consequently, in this respect, the appeal challenges a finding rather than an order, and no right of appeal exists: s 50(1)(a) *Supreme Court Act 1935*.

86 In any event, I would not be inclined to interpret the judge's remarks in the paragraph set out as saying more than that, insofar as Abigroup's pleadings dealt with the validity of the expert determinations, the issue had been finally resolved in its favour.

87 The second challenge arising from the later decision relates to orders made by the judge relevant to an order made earlier in the course of interlocutory proceedings. In May 2008 Justice Gray stayed Hardesty's application for summary judgment upon the basis of the terms set out in an agreement between the parties ("the Tomlin order"). The background in brief terms is as follows.

88 Abigroup's summons was issued on 4 February 2008. Hardesty's cross-action, seeking a declaration that the first expert determination was binding, was filed on 7 March 2008. Ten days later Hardesty applied for a separate trial on that issue. Then on 1 April 2008 it sought summary judgment upon its cross-action. It was in that context that the parties negotiated an agreement, which was reduced to writing bearing the date 26 May 2008. By consent, the application for summary judgment was stayed. Annexed as a schedule to the order made by Gray J was the written agreement.

89 While clause 4 of the agreement preserved each party's contentions on the matters in dispute, it obliged Abigroup to pay to Hardesty the amount of the first determination – referred to as "the interim payment" – being about $499,000 plus interest. In return, Hardesty was to procure a bank guarantee for the same sum in favour of Abigroup, to be called upon if this Court declared that Abigroup was entitled to the money. The guarantee was to expire after four years. By clause 6 of the agreement the guarantee was to be extinguished if the first expert determination was held to be binding.

90 Clause 7 dealt with the converse situation. It read:

> The parties agree that the declaratory relief sought by [Abigroup] at paragraph A of Part 2 of its Statement of Claim shall be treated as extending to declaratory relief also as to the sum paid hereunder, and that they will join in asking the court, if it finds in favour of [Abigroup], to make a declaration, referencing the Guarantee, that the Interim Payment is due for repayment, or, if part only thereof is so due, what part. In such circumstances, [Abigroup] shall be entitled to interest on the Interim Payment or part thereof, as the case may require, from payment until repayment at the contract rate of 8% p.a. simple.

91 The reference to "paragraph A of Part 2" of Abigroup's statement of claim is to the following:

> Part 2:
>
> The remedies sought are:
>
> A. A declaration that it is entitled to be refunded $418,566.99 for payments to which [Hardesty] were not entitled pursuant to the terms of the CSA.
>
> …

92 This provision seems to have had the effect of entitling Abigroup, if ultimately successful, to reclaim the interim payment at the same time as orders were to be made in respect of the alleged overpayment of $418,566.

93 (It is interesting to note that by clause 8 of the agreement Abigroup agreed to pay $3,583 to the expert, Mr Fullerton, within 14 days. That obligation was not expressed to be subject to any reversal.)

94 As a sequel to his finding that the expert determinations were not binding, Anderson J held that Hardesty should repay the interim payment within 21 days. The judge held that the 26 May 2008 agreement did not deal with the eventuality of an early trial dealing only with the validity of the first expert determination, in which Abigroup succeeded: [29] and [33]. He said it did not make commercial sense that, despite having proved its entitlement to the return of the interim payment, Abigroup would have to wait for the return of that sum, in the same way as it must wait for the unrelated sum of $418,566 referred to in Part 2 paragraph A (above): [32]. He found that the purpose of the Tomlin order had been met, that there should be full reimbursement of all amounts paid pursuant to

the agreement (including the $3,583) and that the guarantee should be released. Orders to that effect were made.

95 It seems from the judge's reasons that he saw himself as amending the agreement between the parties, in the sense of implying additional terms, as opposed to merely construing the contract and identifying the event which would give rise to an obligation upon Hardesty to repay the interim payment.

96 Ms K. E. Clark, who put the appellant's arguments arising from the later decision, submitted that the question was simply one of construction of the contract. She cogently argued that, far from anticipating what would flow merely from a decision on enforceability of the first expert determination, clause 4 of the contract expressly contemplated future decisions on the final entitlements of the parties. Even further, by clause 7, Abigroup's claim for a declaration regarding the amount said to be overpaid was to be extended to allow for a declaration that the interim payment was to be repaid. Inasmuch as resolution of Abigroup's claim that it had overpaid Hardesty would necessarily await the trial proper, this was a clear linking of two ultimate issues and an indication that the parties contemplated that the interim payment might be held by Hardesty, even until the time when the final judgment was given.

97 I agree with the appellant's argument as to this aspect of the judge's findings. In my view the contract spoke for itself. It was not open to the judge to alter it or to imply further terms; terms which, on my reading, were at variance with the original ones.

98 While the provisions of the agreement might have seemed disadvantageous to Abigroup in the light of its success in challenging the expert determinations, it had earlier entered into that agreement, with the benefit of legal advice and mature consideration, for reasons which must have then seemed to be good ones. Its position, then, was quite different. At that stage it had one expert determination standing against it (with the very real possibility of a second one to follow) and it was facing applications for a separate trial and summary judgment on Hardesty's cross-action.

99 Accordingly I find that, pursuant to the agreement, the issue of whether the interim payment is to be repaid must await the outcome of the trial proper. It follows that I consider that the payment of $3,583 to Mr Fullerton, in compliance with clause 8, should also stand. In my view that is so irrespective of the outcome of the trial.

100 Therefore, the orders I would make are:

1. As to the decision [2009] SASC 95 and the orders made on 16 April 2009 in relation to both actions – appeal dismissed.

2. As to the decision [2009] SASC 132 and the orders made on 19 May 2009:

(i) appeal allowed;

(ii) orders numbered 2 (ordering repayment of the interim payment), 3 (ordering release of the guarantee in favour of the plaintiff) and 4 (ordering Hardesty to reimburse to Abigroup the amount of $3,583) are set aside.

101 **LAYTON J:** I have had the benefit of reading two detailed reasons for decision given by Sulan and Vanstone JJ. They have greatly assisted my conclusion. Sulan J has conveniently summarised the context in which the issues on appeal have arisen. I agree with the reasoning and conclusions of both judges and agree with the orders proposed by Vanstone J.